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Nos. 14-556, 14-562, 14-571 & 14-574

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES OBERGEFELL, ET AL., Petitioners,

v.

RICHARD HODGES, ET AL., Respondents.

VALERIA TANCO, ET AL., Petitioners,

v.

BILL HASLAM, ET AL. Respondents.

APRIL DEBOER, ET AL., Petitioners,

v.

RICK SNYDER, ET AL., Respondents.

GREGORY BOURKE, ET AL., Petitioners,

v.

STEVE BESHEAR, ET AL., Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF DAVID A. ROBINSON AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Questions Presented

1. Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

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Interest of Amicus Curiae

I am an individual, not a corporation or organization. I am a 62 year-old man, lifelong U.S. citizen, now residing in Connecticut. I am a lawyer. In 1977 I earned a J.D. from Washington University in St. Louis and was admitted to the Massachusetts bar. I practiced law in Massachusetts from 1977 to 2008 and now practice in Connecticut. I am admitted to practice before the U.S. Supreme Court. I am the amicus, not just "counsel for" the amicus.[1]

I write and file this brief because of something I noticed while practicing law in Massachusetts in 2003 and have noticed in all of the recent federal district and circuit court decisions holding that same-sex marriage is a constitutional right: Court-ordered legalization of same-sex marriage effectively, if not explicitly, legalizes a man's marrying his brother or father and legalizes a woman's marrying her sister or mother. It may even legalize a man's marrying a female blood relative—if she is too old to get pregnant. They are all "similarly situated" with the plaintiffs in this case insofar as: They love each other; would benefit from the tax (income tax and estate tax), insurance, and social

[1] All parties have consented to the filing of this brief. The respondents gave blanket consent. The petitioners gave me written consent which I am filing with the Court. No counsel for a party authored this brief in whole or in part. No counsel or party or anyone else made a monetary contribution intended to fund the preparation or submission of this brief. I wrote and paid for it entirely myself.

security benefits of marriage (just being related does not give them those benefits); cannot conceive children together; and pose no more of a health hazard or other hazard than the plaintiffs do.

Suppose a man in Massachusetts wants to marry his brother.[2] He looks at the Massachusetts statutes to see if it is legal. According to Mass. Gen. Laws ch. 207, §§ 1 & 2, it is legal. Those sections prohibit marriages between a man and certain *female* relatives. They do not prohibit marriages between *same*-sex blood relatives. The two brothers apply for a marriage license. If the clerk refuses them the license—perhaps the clerk is opposed to a man's marrying his brother—the clerk might cite a footnote in *Goodridge v. Department of Public Health*, 440 Mass. 309, 343 n.34, 798 NE 2d 941, 969 (2003): "[T]he statutory provisions concerning consanguinity or polygamous marriages shall be construed in a gender neutral manner." Does that mean §§ 1 & 2 *prohibit* a man to marry his brother or father? Those sections on their face *allow* a man to marry his brother or father. The policy considerations that prohibit a man from marrying a *female* blood relative—increased likelihood of birth

[2] Assume that both brothers are adults. Assume that everyone I mention on the subject of who can marry is an adult.

defects if they conceive a child[3]—do not apply to two brothers.

But there is no need to get to the bottom of whether a man can or cannot marry his brother (or father) in Massachusetts. As I will demonstrate, the federal court decisions over the past 18 months that have ordered states to allow same-sex marriage can easily be read to hold that a man can marry his brother or father, and can possibly be read to hold he can marry a post-menopause female blood relative (e.g., his mother). Such "couples" are "similarly situated" with same-sex couples: They love each other; want the tax (income tax and estate tax) benefits, insurance benefits, and social security benefits of marriage (just being related does not entitle them to those benefits); cannot conceive children together; and pose no more of a health hazard or other hazard than the plaintiffs do.

I fear that if this court answers "yes" to the questions presented, the next wave of marriages will be "couples" who are blood relatives seeking the tax, insurance, and social security benefits of marriage. If they are denied marriage licenses, they will sue in court and, based on this Court's decision, be awarded a marriage license. This will make marriage a joke—a bad joke. It will ruin or significantly harm the institution of marriage.

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[3] *Nguyen v. Holder*, 24 N.Y.3d 1017, 1021, 21 N.E.3d 1023, 1026 (2014) (Smith, J., concurring)

Would it be ridiculous to issue a marriage license to a man and his elderly mother? Five or ten years ago, most Americans thought it was ridiculous to issue a marriage license to two men. Yet here we are in the U.S. Supreme Court. A man and his elderly mother could stand before this Court soon.

Why would a man want to marry his elderly mother? Maybe they want to avoid estate tax when she dies. They want the marital exemption. They are "similarly situated" with the plaintiffs in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

Someone will probably object to a man's marrying his mother. Their objection: "It's incest! Incest is illegal! Incest is disgusting! Don't compare same-sex marriage with incest!" The man and his mother will remind them that same-sex marriage was illegal in all 50 states until 2003—when courts began holding those laws unconstitutional—and many people regarded same-sex marriage as disgusting. If the laws banning same-sex marriage are unconstitutional, so are the laws banning nonprocreative incest (incest that cannot conceive children).

Many people are saying that public opinion is shifting in favor of same-sex marriage. Maybe it is; I don't know. But if it is, I think one reason is that most people do not realize that court-ordered legalization of same-sex marriage will legalize a man's marrying his brother or father. The courts

have said little about it. The plaintiffs have said almost nothing about it. The states that are defending the traditional marriage laws (defining marriage as the union of a man and woman who are not blood relatives of each other) are, I think, reluctant to speak about it. They do not want to be accused of comparing or equating homosexuality with incest. In this brief, I do not necessarily "compare" or "equate" anything. I just provide information. What this Court and the American people do with this information is up to this Court and the American people. I am just a messenger.

Summary of Argument

A "yes" answer to the questions presented will enable a man to marry his brother or father. They are "two people of the same sex." Such a marriage would be ridiculous and greatly diminish the institution of marriage. The Fourteenth Amendment does not require a state to license a marriage between two brothers, and concomitantly does not require a state to license a marriage between two male friends (or two female friends). Two male friends should not be allowed to pay lower taxes and collect higher social security benefits than two brothers. It will happen if two male friends are allowed to marry and two brothers are not.

A "yes" answer may also enable a man to marry a female blood relative—if she is too old to get

pregnant. A man and his elderly mother are "similarly situated" in all *relevant* respects to the plaintiffs in these cases. They love each other, want the benefits of marriage, and cannot conceive children together.

The only realistic possibility of allowing same-sex marriage without allowing some incestuous marriages is to allow each state to decide for itself. Each state should decide whether to allow two male friends to marry. Each state should decide whether to allow two brothers to marry. The Court should answer the questions presented "no." That will send the issue back to state legislatures where it belongs.

Argument

I. If the Fourteenth Amendment requires a state to license a marriage between two people of the same sex, it *ipso facto* requires a state to license a marriage between two brothers, or two sisters. They are "two people of the same sex." It may also require a state to license a marriage between a man and post-menopause female blood relative. They are "similarly situated" as a same-sex couple.

The Fourth, Seventh, Ninth, and Tenth Circuit decisions holding that same-sex marriage is a constitutional right hold, or seem to hold, that two brothers have the right to marry. They might even

hold that a man has the right to marry his father or mother (if she is post-menopause). To the extent, if any, that a state's incest laws prohibit such marriages, these court decisions effectively, if not explicitly, hold those laws unconstitutional. I'll now explain how.

In *Bostic v. Schaefer*, 760 F.3d 352, 381 (4th Cir.), *cert. denied*, 135 S. Ct. 308 (2014), the court stated, "Because same-sex couples and infertile opposite-sex couples are similarly situated, the Equal Protection Clause counsels against treating these groups differently." If "same-sex couples and infertile opposite-sex couples are similarly situated," then giving same-sex couples the right to marry gives a man the right to marry his brother, father, infertile sister, infertile mother, or infertile daughter. *Id.* at 386 (Niemeyer, J., dissenting) (majority opinion gives, or seems to give, father right to marry daughter). A man and any one of those relatives are "similarly situated" with a same-sex couple: They love each other; desire the tax (income and estate tax) benefits, insurance benefits, and social security benefits of marriage (just being blood relatives does not entitle them to those benefits); cannot conceive children together; and are not harming anyone else's marriage. Although *Bostic* states, "[W]e do not mean to suggest that every state regulation relat[ing to marriage] must be subjected to rigorous scrutiny," *id.* at 377, *Bostic* does not seem to exclude nonprocreative incestuous couples from marrying.

In *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014), the court sidestepped the issue by saying it is not necessary to discuss it. *Id.* at 657. *Baskin* focuses on the best interests of the child. *Baskin* opines that children will fare better if the couples raising them can marry. *Id.* at 661. If *Baskin* is correct, then a grandmother and her adult son who are raising her grandchild should be allowed to marry. Consider the following scenario. It is fairly common, not farfetched.

Jane is a 70-year-old widow who lives with her 45 year-old son, Bill, who is divorced. Bill has a 23-year-old daughter, Nancy, who is a drug addict. The man who supplies drugs to Nancy has sex with Nancy and impregnates her. She gives birth to a child, James. She is unfit to raise James but does not want to completely give James up for adoption. She, Jane, and Bill come up with a solution. Jane and Bill will raise James, and Nancy can see James whenever Nancy wants. The question is: Should Jane and Bill be allowed to marry? Would their marrying help James? I have carefully read *Baskin*. If everything *Baskin* says about same-sex couples and "their children" is correct, Jane and Bill—a 70-year-old mother and her 45-year-old son—should be allowed to marry. It is in the best interests of the child (James). *Baskin* opines that allowing same-sex marriage will not hurt anyone significantly. *Id.* at 669. The same can be said about Jane's marrying Bill.

Baskin opines, "Marriage confers respectability on a sexual relationship; to exclude a couple from marriage is thus to deny it a coveted status." 766 F.3d at 658. If *Baskin* is correct, then allowing Jane and Bill—a mother and her adult son—to marry will make their sexual relationship, if any, respectable. I respectfully disagree. This is why the answer to the second question presented (recognition of same-sex marriage licensed and performed out-of-state) is no. If State A were to allow a man to marry his mother, a man and his mother might marry there and eventually move to State B. Would State B have to recognize their marriage? I hope not.

Baskin rejects *Baker v. Nelson*, 409 U.S. 810 (1972). *Baskin* says *Baker* is "the dark ages so far as litigation over discrimination against homosexuals is concerned." 766 F.3d at 660. I dare say that 2015 to 2020 will be a darker age than 1972 if a man is allowed to marry his elderly mother in 2015 to 2020. Marriage will become a joke—a bad joke.

Judge Daughtrey, the dissenting Sixth Circuit judge in *DeBoer*, called *Baker* an "aging one-line order" consisting of only "eleven words." 772 F.3d at 430-31. I surmise that the reason *Baker* is only eleven words is that the Supreme Court in 1972 regarded the assertion that same-sex marriage is a constitutional right as frivolous—unworthy of detailed explanation. The 1972-73 Court was hardly conservative or prudish. Three months after *Baker*,

the Court decided *Roe v. Wade*, 410 U.S. 113 (1973). The Court found somewhere in the penumbras of the Constitution a right to first-trimester abortion. But the Court found nowhere in the Constitution a right to same-sex marriage. The Court did not even regard it as a substantial federal question.

Another reason *Baker* is only 11 words long, I surmise, is that this Court had nothing to add to what the Minnesota Supreme Court said in *Baker*. 291 Minn. 310, 191 N.W.2d 185 (1971). Everything the Minnesota Supreme Court said in *Baker* was correct in 1971 and is correct in 2015. It still takes a man and woman to conceive a child. The government's interest in the man and woman's staying together and raising the child together is the same today as it was in 1971. It is the same today as it was in 1971 B.C. Homosexuality is the same today as it was in ancient times. Even if one is an atheist and believes that the Bible is fiction, the Bible proves one thing: Homosexuality existed in ancient times, and public opinion of homosexuality was the same in ancient times as it is in 2015: lower than the public's opinion of heterosexuality. Nothing about sex has changed. A man still has a penis. A woman still has a vagina. The penis is still designed to fit into the vagina. Most people think it is incorrect—not necessarily a "sin" or "terrible," but incorrect—to insert it into a man's (or woman's) mouth or anus. A child is still dependent on his or her parents for the first 20 or so years of life. In ancient times, 100% of the population was conceived as a result of a man's

inserting his penis into a woman's vagina. Today, with modern reproductive technology, that figure might be down to 99.5% or so, but it still takes a man and woman even if it does not take insertion of the penis into the vagina.

Baskin held Indiana Code § 31-11-1-1 (same-sex marriage prohibited) unconstitutional. That, in my view, makes § 31-11-1-2 (marriage to close relative prohibited) unconstitutional as applied to *same*-sex marriage to a close relative and possibly as to opposite-sex marriage to a close relative if the woman is too old to get pregnant. Close relatives who cannot conceive children together are similarly situated with same-sex couples. *Baskin* did not explicitly declare § 31-11-1-2 unconstitutional, but I assume (perhaps I'm mistaken) that none of couples in *Baskin* are blood relatives, so the court had no need to address it.

In *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), the panel's opinion says nothing on the topic of same-sex marriage between blood relatives. Judge Reinhardt, concurring, says:

> Defendants are apparently concerned that if we recognize a fundamental right to marry the person of one's choice, this conclusion will necessarily lead to the invalidation of bans on incest, polygamy, and child marriage. However, fundamental rights may

> sometimes permissibly be abridged: when the laws at issue further compelling state interests, to which they are narrowly tailored. Although such claims are not before us, it is not difficult to envision that states could proffer substantially more compelling justifications for such laws than have been put forward in support of the same-sex marriage bans at issue here.

Id. at 478 n.2. Judge Reinhardt says it is "not difficult," but I find it extremely difficult to envision a compelling justification for allowing two male friends, but prohibiting two brothers, to marry. I am unable to envision it. A law banning marriage of blood relatives is not, to use Judge Reinhardt's words, "narrowly tailored." A "narrowly tailored" law would prohibit blood relatives to marry only if they are at risk of conceiving a child. It would allow Jane (page 8 *supra*), who is post-menopause, to marry her 45-year-old son.

Judge Reinhardt says a law prohibiting same-sex marriage "necessarily serves to convey a message of disfavor towards same-sex couples and their families. This is a message that Idaho and Nevada simply may not send." *Id.* at 476. If the state cannot send such a message to same-sex friends, it cannot send such a message to same-sex relatives.

Judge Reinhardt opines that a person has "the right to marry an individual of one's choice." *Id.* at 477. People are "free to marry the one they love." *Id.* at 479. That would seem to allow a man to marry his elderly mother.

Judge Berzon, concurring in *Latta*, did so because the laws against same-sex marriage "treat the subgroup of men who wish to marry men less favorably than the otherwise similarly situated subgroup of women who want to marry men." *Id.* at 484. How, then, is it permissible to treat the subgroup of same-sex couples who are related (e.g., two brothers) less favorably than the subgroup of same-sex couples who are not related? I don't see how. It is certainly permissible to treat a brother and *sister* less favorably than a man and woman who are not blood relatives and are married to each other. The marriage laws properly discourage a man from marrying and/or having sex with his sister. But there is no reason to treat two brothers less favorably than two male friends.

Judge Berzon opines that "companionate marriage," that is, "legal marriage for companionship purposes without the possibility of children," should be allowed. *Id.* at 494. Why not allow Jane and Bill, the 70 year-old widow and her 45-year-old son, to marry for companionship purposes? Why should Jane and Bill pay higher taxes and collect lower social security benefits than the plaintiffs in these cases?

In *Kitchen v. Herbert*, 755 F.3d 1193, 1215-16 (10th Cir.), *cert. denied*, 135 S. Ct. 26 (2014), the majority held that a state "cannot define marriage in a way that denies its citizens the freedom of personal choice in deciding whom to marry, nor may it deny the same status and dignity to each citizen's decision," *quoting De Leon v. Perry*, 975 F. Supp. 2d 632, 659 (W.D. Tex. 2014), *appealed*, No. 14-50196 (5th Cir. argued Jan. 9, 2015). That statement, alone, would allow anyone to marry anyone. To avoid that, *Kitchen* tries to distinguish same-sex marriage from incestuous marriage: "Unlike polygamous or incestuous marriages, the Supreme Court has explicitly extended constitutional protection to intimate same-sex relationships, see *Lawrence*, 539 U.S. at 567, and to the public manifestations of those relationships, *Windsor*, 133 S. Ct. at 2695" (citations in original). 755 F.3d at 1229. The problem is, if the Supreme Court has explicitly extended constitutional protection to intimate same-sex relationships, what about two brothers who want to marry? They are an "intimate same-sex relationship." Can they marry? *Kitchen* does not seem to exclude them. When *Kitchen* says the Supreme Court has not explicitly extended constitutional protection to "incestuous marriages," *Kitchen* is possibly referring to marriages between a male and *female* blood relative, not a same-sex blood relative.

I did not read all of the District Court decisions ordering states to allow same-sex

marriage, but I read or skimmed many of them. None of the ones I read exclude two brothers. The District Court decisions that address this issue are the ones that did *not* order the state to allow same-sex marriage: *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 926 (E.D. La. 2014), *appealed*, No. 14-31037 (5th Cir. argued Jan. 9, 2015), and *Conde-Vidal v. Garcia-Padilla*, 2014 WL 5361987, at *10 (D.P.R. Oct. 21, 2014). *Robicheaux* states:

> And so, inconvenient questions persist. For example, must the states permit or recognize a marriage between an aunt and niece? Aunt and nephew? Brother/brother? Father and child? May minors marry? Must marriage be limited to only two people? What about a transgender spouse? Is such a union same-gender or male-female? All such unions would undeniably be equally committed to love and caring for one another, just like the plaintiffs. *Plaintiffs' counsel was unable to answer such kinds of questions; the only hesitant response given was that such unions would result in "significant societal harms" that the states could indeed regulate. But not same-gender unions.* This Court is powerless to be indifferent to the unknown and possibly imprudent consequences of such a decision.

(emphasis supplied). The plaintiffs and their counsel in the present case have no answer to these disturbing ("inconvenient") questions as far as I can tell from reading their briefs. The Michigan plaintiffs say on page 1 of their brief, "The right to marry the person of one's choice is a fundamental freedom." That does not exclude two brothers.

The Kentucky plaintiffs say on page 23 n.4 of their brief, "Reasonable regulations based on criteria other than sexual orientation, and that do not directly and substantially interfere with this right, may legitimately be imposed" (internal quotation marks and citation omitted). That, in my opinion, does not exclude two brothers. The Kentucky plaintiffs point out on page 8 of their brief that in Kentucky a couple cannot marry if they are "nearer of kin to each other . . . than second cousins." Ky. Rev. Stat. §§ 402.010-020. If this Court reverses the Sixth Circuit's decision, it will or may render §§ 402.010-020 unconstitutional as applied to *same*-sex kin. Since the Kentucky statute prohibits same-sex marriage, § 402.020(1)(d), the obvious purpose of §§ 402.010 (marriage to close blood relative prohibited) is to prevent a man from marrying a *female* blood relative. If a man marries a female blood relative, they might conceive a child with an increased risk of birth defects. Two men cannot conceive a child. So there is no rational basis for allowing two male friends, but prohibiting two brothers, to marry. My guess is that if this Court

reverses the Sixth Circuit decision, §§ 402.010-020 are unconstitutional as applied to same-sex kin.

The Ohio plaintiffs say on page 34 of their brief, "The freedom to select the spouse of one's choice receives constitutional protection precisely because of the expectation that this will be the single person with whom one will travel through life, sharing profound intimacy and mutual support through life's good times and bad." That does not exclude two brothers.

The Tennessee plaintiffs say on page 19 of their brief, "The constitutionally protected freedom to marry includes the freedom to choose whom to marry" and "the freedom to marry the one person with whom each has forged enduring and irreplaceable bonds of love and commitment." That does not exclude two brothers.

The plaintiffs' briefs, in my view, argue that the Fourteenth Amendment requires a state to license a marriage between two brothers. It is very difficult, or impossible, to plausibly argue that two men should be allowed to marry but two brothers should not. It makes no sense. It is easy to argue why a man should not be allowed to marry a *female* blood relative *of childbearing age.* They might conceive a child with birth defects. But it is very difficult, if a man can marry a man, to prohibit him from marrying his brother. It is like telling a man, "You can go to the football game with anyone you

want but not your brother or father." It has no rational basis.

II. Two men who want to marry are more equal to two brothers who want to marry than to a man and woman who want to marry. Does the Fourteenth Amendment require a state to license a marriage between two brothers? No.

The plaintiffs have chosen the wrong comparators. The plaintiffs should be compared with two brothers, or two sisters, not a man and woman. Two sisters are "two people of the same sex." In *DeBoer*, for example, everything the District Court said about the plaintiffs can be said about two sisters, or two brothers:

> Plaintiffs are an unmarried same-sex couple residing in Hazel Park, Michigan. They have lived together for the past eight years and jointly own their residence. Both are state-licensed foster parents. DeBoer is a nurse in the neonatal intensive care unit at Hutzel Hospital and Rowse is an emergency room nurse at Henry Ford Hospital, both located in Detroit. In November 2009, Rowse, as a single person, legally adopted child N. In October 2011, also as a single person, she legally adopted

> child J. In April 2011, DeBoer, as a single person, adopted child R. [They want] to jointly adopt the three children.

973 F. Supp. 2d at 759-60. Two unmarried sisters can live together and jointly own their residence. They are a couple. Both can be state-licensed foster parents and work as nurses. Each can legally adopt a child in exactly the manner the plaintiffs did. Do two sisters have a constitutional right to marry? No.

III. The traditional marriage laws are a three-legged stool. Breaking any of the legs collapses or substantially collapses the stool.

No answer to the questions presented is complete without examining why states have marriage laws in the first place. Michigan's brief (at 17-20, 25) explains it well. I will add a few words. Succinctly stated, the purpose of the marriage laws is to make sexual intercourse—penetration of the vagina by the penis—respectable. Sexual intercourse is not respectable unless the couple is married. Marriage does not make any other type of sexual contact, such as oral sex or anal sex—homosexual or heterosexual, married or unmarried—respectable. Other types of sexual contact are often *allowed* but are not respectable. Sexual intercourse is respectable in human civilization only if the man and woman

1) are above the age of consent (16, 17, or whatever), 2) have promised not to have sex with anyone else unless and until one of them dies, 3) have promised to stay together for life ("till death do us part"), and 4) are not blood relatives of each other. A marriage certificate is a proclamation that a man and woman meet all four criteria. It proclaims, essentially, that if the man and woman have sexual intercourse, their intercourse is respectable, not naughty.

Why is sexual intercourse "naughty" if the couple is not married? Because sexual intercourse can lead to pregnancy and childbirth. A child is dependent on his or her parents for the first 20 or so years of life. The government hopes a man and woman who conceive a child stay together and raise the child together. It is not respectable for a man to walk away from a woman he impregnated and a child he fathered.

Not every act of sexual intercourse leads to pregnancy. Not every married couple conceives a child. Not every married couple has sexual intercourse. But 99.999% of the people who ever lived were conceived as a result of a man's inserting his penis into a woman's vagina (that is my guess; I do not know the exact figure), and 87% of male-female married couples conceive a child.[4] So, the

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[4] James B. Stewart, "A C.E.O.'s Support System, aka Husband," *N.Y. Times*, Nov. 4, 2011, www.nytimes.com/2011/11/05/business/a-ceos-support-system-

purpose of the marriage laws is "not to regulate love but to regulate sex, most especially the intended and unintended effects of male-female intercourse." *DeBoer v. Snyder*, 772 F.3d 388, 404 (6th Cir. 2014).

Allowing same-sex couples to marry would not increase the respectability of homosexual sex any more than allowing a 45-year old man to marry his 70-year-old mother would increase the respectability of middle-aged (too old to conceive children) incestuous sex. It might be a little more respectable if they are married than if they are unmarried, but only a little more.

The only sexual activity that a majority of people in every society in the history of civilization has respected is intercourse between a man and woman who are married to each other. A marriage certificate certifies that if the couple has sexual intercourse, it is OK, not naughty.

It is important to keep in mind that the traditional definition of marriage is not simply "the union of a man and woman." It is "the union of a man and woman who are not blood relatives of each

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a-k-a-husband.html?pagewanted=all&_r=0iting (last visited Mar. 29, 2015). The *Times* derived the 87% figure from a Pew Research report that says, "Among 40-44-year-old women currently married or married at some point in the past, 13% had no children of their own in 2008." www.pewsocialtrends.org/2010/06/25/childlessness-up-among-all-women-down-among-women-with-advanced-degrees/ (last visited Mar. 29, 2015).

other and not married to anyone else." The "not blood relatives of each other and not married to anyone else" requirement proves that the marriage laws are intended to encourage responsible procreation. It is irresponsible for a man to procreate with his sister, mother, or daughter, or with anyone else except his wife.

A same-sex couple—just the two of them—cannot conceive a child. Therefore, it makes no sense to grant a same-sex couple a marriage license. A same-sex couple can adopt a child, but adoption is not conception. Usually—not always, but usually—when a child is put up for adoption, the purpose of the marriage laws has already been defeated. The natural parents are not raising the child together. Allowing two men to marry does not turn defeat into victory. Furthermore, the percent of same-sex couples who adopt an "unwanted" child—a child conceived by neither of them—is only a small fraction of the percent of male-female married couples who conceive a child. According to petitioner-side amicus Gary J. Gates, nearly one-fifth of same-sex couples are raising children under the age of 18 (his brief at 4), and approximately one-fifth of those children are adopted or fostered (*id.* at 14). I assume, unless I'm mistaken, that "adopted or fostered" means not conceived by either member of the same-sex couple. By my arithmetic (if I am mistaken, someone can correct me), only about 4% (1/5 of 1/5 is

4%) of same-sex couples adopt or foster a child that was not conceived by either of them.

In addition, the marriage laws reward the married couple for maintaining that respectability, that is, for *staying* married. The rewards consist of tax benefits, insurance benefits, social security benefits, and some other benefits. If the couple divorces, the benefits end.

Of course, a marriage certificate does not *guarantee* monogamy or say anything about a couple's sex habits or fertility, but is at least a solemn, public promise of monogamy and togetherness.

Denying a marriage license to same-sex couples does not single out homosexual sex, per se, as unworthy or less worthy of respect. Rather, it classifies homosexual sex with other types of sex, including many types of heterosexual sex, that society has little or no respect for, such as oral sex, anal sex, and mutual masturbation. *See Lawrence v. Texas*, 539 U.S. 558, 568-69 (2003). Many people do not regard those types of sex as "sex." To many people, "sex" is penetration of the vagina by the penis.

Boiled down to basics, the traditional marriage laws are a three-legged stool. The three legs are 1) minimum age, 2) sexual complementarity (a male and female), and 3 genetic dissimilarity (not

blood relatives of each other). Breaking any of those legs, as the plaintiffs request this Court to do (end the male-female requirement), collapses or substantially collapses the stool. If a man can marry a man, two brothers can marry. If two brothers can marry, a man and his elderly (too old to get pregnant) mother can marry. A man's having sex with his elderly mother is morally disapproved by many people but no more dangerous than homosexual sex. Homosexual sex is likewise morally disapproved by many.

IV. How many people will try to marry a blood relative? Does it matter?

I argue in this brief that court-ordered legalization of same-sex marriage effectively if not explicitly legalizes a man's marrying his brother or father and possibly legalizes his marrying a post-menopause female blood relative. Am I saying that such marriages have actually occurred? I have no idea whether such marriages have occurred. I wonder how anyone, in states that federal judges have ordered to allow same-sex marriage, would know if two brothers are marrying. If the state's marriage license application now says "Person A" and "Person B" instead of "Bride" and "Groom," how does the state know that Persons A and B are not brothers? Maybe they are brothers. And if the application asks if the people are "related," or,

instead of asking explicitly if they are "related," asks the full names, including mother's maiden name, of both parents of both parties—which is another way of asking if the parties are "related"—*why* does it ask? Does the state plan to reject the license if it's two brothers? Why? The Fourth, Seventh, Ninth, and Tenth Circuits held that same-sex marriage is a constitutional right. They did not exclude two brothers. Why discriminate against two brothers who love each other and want to marry? How would their marriage harm anyone else's?

President Obama said on January 22, 2015, "Two people who love each other and are treating each other with respect and aren't bothering anybody else" should be allowed to marry.[5] Vice President Biden, speaking in support of same-sex marriage at the annual gathering of the Human Rights Campaign on March 22, 2014, said, "The single most basic of all human rights is the right to decide who you love."[6] They don't seem to be excluding two brothers.

The legal profession, me notwithstanding, is mostly in favor of same-sex marriage. It is possible that lawyers are, for now, refusing to accept two

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[5] www.wsj.com/articles/obama-hopes-the-supreme-court-recognizes-nationwide-right-to-gay-marriage-1421970039 (last visited Mar. 29, 2015).

[6] Ian Lovett, "Biden notes progress in gay rights, but says there is 'much left to do,'" *N.Y. Times*, Mar. 23, 2014.

brothers as clients in "marriage equality" litigation. These lawyers do not want to upset the apple cart. They want the Supreme Court to declare same-sex marriage a constitutional right. They know that if a man marries his brother now (March-April 2015), it may dissuade the Court from holding that same-sex marriage is a constitutional right. It may diminish public opinion of same-sex marriage. So they are waiting for the Court to declare same-sex marriage a constitutional right. After—that is, *if*—the Court declares same-sex marriage a constitutional right, *then* some of these lawyers will accept two brothers as clients. If they don't, some other lawyers will. It will be the "new" or "next" civil rights movement enabling lawyers to collect court-awarded fees when they prevail. Tax lawyers will publish articles explaining how a man can avoid estate tax when his rich, elderly mother dies: Marry her before she dies. He then is entitled to the marital exemption. If the state does not allow him to marry her, sue in federal court. Argue they are "similarly situated" to the plaintiffs in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

This new movement will be easier for them to win than the same-sex marriage movement was. Same-sex marriage was a giant leap. If same-sex marriage is declared a constitutional right, allowing two brothers to marry will be one small step. Two brothers *are* a same-sex couple.

Then it will be a second small step to allowing a man to marry a female blood relative. The notion that such a couple is at increased risk of conceiving a child with birth defects is just a stereotype, they'll say. They'll argue that not every child conceived by incest has birth defects and that some incestuous couples are at very low risk of conceiving a child with birth defects. They'll point out that not every married couple has sexual intercourse. They'll point out that the vast majority of women whose sons are old enough to marry are too old to get pregnant. So there's nothing to worry about, they'll say.

Although the district and circuit courts have spoken in broad freedom-to-marry language, they rule unconstitutional only the specific part of the state statute that the plaintiffs, who I assume are not related to each other, ask to be ruled unconstitutional. So, when I say a man can marry his brother in the Fourth, Seventh, Ninth, and Tenth Circuits, I am not necessarily saying the clerk will issue the license freely. The clerk might refuse. But if the couple sues in federal court, the couple has a good chance of winning. The couple need only cite *Bostic*, *Baskin*, *Latta*, and/or *Kitchen*. In nearly all the states under federal court order to allow same-sex marriage, the court orders were issued only within the past 22 months (since *Windsor* on June 26, 2013). So it may be too soon to tell whether people will try to marry their blood relatives.

I fear that some will. In 38 years as a lawyer, I have learned that if people can make or save money by doing something that is legal, some will do it. I think some people will marry a blood relative if it will lower their taxes or increase their social security benefits or insurance benefits. I have also learned that if lawyers think they can win a case and collect attorneys' fees from the other side, one or more lawyers will bring such a case.

It is possible that the lawyers in the present case will say, "Don't worry about it. It won't happen. We're opposed to two brothers' marrying." Even if they are sincere about that, they do not speak for all lawyers. They and this Court should heed the words of the Eleventh Circuit in *Williams v. Attorney General of Alabama*, 378 F.3d 1232, 1240 (2004):

> At oral arguments, the ACLU contended that "no responsible counsel" would challenge prohibitions such as those against pederasty and adult incest under a "right to sexual privacy" theory. However, mere faith in the responsibility of the bar scarcely provides a legally cognizable, or constitutionally significant, limiting principle in applying the right in future cases.

(quotation marks in original).

It is possible that the plaintiffs will argue that allowing a man to marry his brother or father might upset family harmony. Many families' harmony is upset by their son's (or brother's or father's) marrying a man. It makes no difference which man he is marrying. Preserving "family harmony" is no reason to ban a marriage. *Israel v. Allen*, 195 Colo. 263, 265, 577 P.2d 763, 764 (1978). Genetic risk to offspring is a reason, but that applies only if a man marries a female blood relative. *Id.*

So I stand by my argument. If this Court reverses the Sixth Circuit decision, it will give a man the right to marry his brother or father. It may give a man the right to marry a post-menopause female blood relative. How many will *exercise* that right, I do not know. Even if the number is small, giving people the right to marry a blood relative significantly diminishes the institution of marriage.

V. "Don't compare us to two brothers. Don't equate homosexuality with incest. Incest is illegal." My response: Don't be so sure it's "incest." Don't be so sure it's illegal, and even if it is illegal, so is same-sex marriage in most states.

It is possible that the plaintiffs and their lawyers are not all of one mind on the question whether the Fourteenth Amendment requires a state to license a marriage between two brothers. Some

probably believe it does, some don't. What is the argument of those who don't? Why do they think it is OK for two male friends to have sex and marry but not two brothers? I am not exactly sure. But suppose their argument is, "If it's two brothers, it's incest! Incest is illegal." I already discussed this briefly (pages 4, 16-17 *supra*). I argued that if laws banning same-sex marriage are unconstitutional, so are laws banning same-sex incest. I will add a few words here.

The definition of "incest" varies widely from state to state. If a man touches his brother's rear end, is that "incest?" If two brothers masturbate each other with their hands, is that "incest?" If two brothers have oral sex, is that "incest?" If two brothers marry, is that "incest?" Do the incest laws even apply to two adult brothers, or only to opposite-sex relatives (e.g., brother-sister)? It varies widely from state to state. Some states' statutes do not use the word "incest." I don't think Michigan's statutes use the word "incest" anymore. *People v. Johnson*, 406 Mich. 320, 327 n.1, 279 N.W.2d 534 (1979) (the word "incest" is obsolete). In Michigan a man cannot marry a female blood relative. Mich. Comp. Laws §§ 551.3 & 551.4. No Michigan statute prevents a man from marrying his brother except the statute that prevents a man from marrying a man. So if a man can marry a man in Michigan, he can marry his own brother.

Ohio, to my knowledge, does not use the word "incest" in its marriage statutes or criminal statutes. It uses the word in some other statutes. The marriage statute, Ohio Rev. Stat. § 3101.01(A), provides:

> Male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage. A marriage may only be entered into by one man and one woman.

If the language "A marriage may only be entered into by one man and one woman" is unconstitutional, I assume that the language "not nearer of kin than second cousins" is unconstitutional as to *same*-sex kin. It has no rational basis as to *same*-sex kin. So, if a man can marry a man in Ohio, I assume that he can marry his own brother. Can the brothers have sex if they marry? It seems to me they can. Ohio Rev. Stat. § 2907.03(A)(5).

At least one state is thought not to even have incest laws. After an article entitled "What It's Like to Date Your Dad" appeared in *New York* magazine in January 2015,[7] some New Jersey lawmakers read

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[7] http://nymag.com/scienceofus/2015/01/what-its-like-to-date-your-dad.html (last visited Mar. 29, 2015).

it and noticed that incest might be legal in New Jersey. An assemblywoman said incest was decriminalized in New Jersey in the 1970s while the state was revamping criminal laws, and lawmakers "never got around to making it a criminal offense again."[8] They are contemplating recriminalizing incest.

So, declaring that "The statutory provisions concerning consanguinity or polygamous marriages shall be construed in a gender neutral manner," as does *Goodridge*, 798 NE 2d at 969 n. 34, may sound lofty but makes no sense and results in confusion. The marriage consanguinity laws make sense only if they are gender-specific, not gender neutral. The *raison d'être* for those laws is to prohibit a man from marrying a *female* blood relative.

Ordering state officials "to treat same-sex couples the same as different sex couples in the context of processing a marriage license," as does *Waters v. Ricketts*, 8:14-cv-00356-JFB-TDT Doc # 55 (D. Neb. Mar. 2, 2015), is constitutionally incorrect. The Fourteenth Amendment does not confer rights on "couples." It confers rights on individuals. Every individual already has an equal right to marry. Every individual has the right to marry someone of the opposite sex who is not a blood relative of theirs.

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[8] New Jersey Pol Introducing Bill To Re-Criminalize Incest, http://newyork.cbslocal.com/2015/01/29/new-jersey-pol-introducing-bill-to-re-criminalize-incest/ (last visited 3/30/15).

Denying marriage licenses to same-sex couples is no more discriminatory than denying marriage licenses to incestuous couples. Also, does *Waters* hold that two brothers *can*, or can*not*, marry? I'm not sure. Two brothers are a same-sex couple.

Declaring that a marriage license cannot be denied "solely because the individuals are of the same gender," as does *Rosenbrahn v. Daugaard*, 2015 WL 144567, at *11 (D.S.D. Jan. 12, 2015), reads into the Fourteenth Amendment something that isn't there. Two brothers might suggest adding the word "ancestry" to the order. They'll argue they should not be denied a marriage license solely because of their ancestry (they have the same ancestors).

Another reason that holding same-sex marriage to be a constitutional right would allow a man to marry his brother or father, regardless of the incest laws, is this. "Private, consensual sexual intimacy between two adult persons of the same sex may not be punished by the State." *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013), *citing Lawrence v. Texas*, 539 U S. 558, 567 (2003). Nothing in *Windsor* or *Lawrence* excludes same-sex incest from the Court's holding. Justice Scalia pointed this out in *Lawrence*. 539 U.S. at 590. The day Justice Scalia was worrying about has arrived.

VI. The only plausible way to legalize same-sex marriage without legalizing a man's marrying his brother is to allow each state to decide for itself.

Thirteen states have enacted statutes allowing same-sex marriage. All 13 statutes were written within the past six years. All 13 prohibit two brothers to marry. Cal. Family Code § 300; Conn. Gen. Stat. § 46b-21; Del. Laws tit. 13, § 101(a); Haw. Rev. Stat. § 572-1(1); Ill. Comp. Stat. 750, ch. 40, par. 212(a)(2); Maine Rev. Stat. § 701(2)(a); Md. Code Ann., Fam. Law § 2-202(b)(1); Minn. Stat. 2013, § 517.03(2); N.H. Rev. Stat. § 457:2; N.Y. Penal Law § 255.25;[9] R.I. Gen. Laws § 15-1-2; Vt. Stat. tit. 15 § 1a; and Wash. Rev. Code § 26.04.020(2). Whether this legislation, discriminating as it does against two brothers, has a rational basis, I don't know. Frankly, I don't think it does. I think it is, to be very frank about it, hypocrisy for same-sex marriage supporters to favor a statute that allows two male friends, but prohibits two brothers, to marry. It discriminates against two brothers the way the traditional marriage laws discriminate against the plaintiffs. It is the pot calling the kettle black.

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[9] Until a few weeks ago, I thought the New York statute allowing same-sex marriage allows two brothers to marry. I said so in my amicus briefs in *Latta*, *Baskin*, and *DeLeon*. It certainly seems to allow it. N.Y. Domestic Relations Law § 5. But now I see that a New York penal statute, Penal Law § 255.25, makes, or seems to make, it illegal. I do not know if New York would license a marriage between two brothers.

Virginia in 2014 decriminalized oral and anal sex between two male friends but not between two brothers. Acts of 2014, ch. 794, § 18.2.361(A) & (B). Between two brothers, it remains a Class 5 felony. Here is how it is indicated on Virginia's website[10] on March 30, 2015 (strikethroughs in original):

> § 18.2-361. Crimes against nature; penalty.
>
> A. If any person carnally knows in any manner any brute animal~~, or carnally knows any male or female person by the anus or by or with the mouth,~~ or voluntarily submits to such carnal knowledge, he ~~or she shall be~~ *is* guilty of a Class 6 felony~~, except as provided in subsection B~~.
>
> B. Any person who performs or causes to be performed cunnilingus, fellatio, anilingus, or anal intercourse upon or by his daughter or granddaughter, son or grandson, brother or sister, or father or mother is guilty of a Class 5 felony. However, if a parent or grandparent commits any such act with his child or grandchild and such child or grandchild is at least 13 but less than 18 years of age at the time of the offense, such parent or grandparent is guilty of a Class 3 felony.

[10] https://leg1.state.va.us/cgi-bin/legp504.exe?141+ful+CHAP0794 (last visited Mar. 30, 2015).

That, in my opinion, is mind-boggling. A man in Virginia cannot have anal sex with his brother but can with a (consenting) friend or stranger. Two Virginia brothers who have anal sex are treated even worse than second-class citizens. They are treated as Class 5 felons.

But the legislatures of those states passed those laws, so those laws are entitled to a presumption of constitutionality. That is as it should be.

If this Court answers the questions presented "no," it is not the end of the same-sex marriage movement. Same-sex marriage supporters can continue to go state-to-state and try to persuade each state's legislature or voters to allow same-sex marriage. They have succeeded in 13 states. Whether they should try to exclude two brothers from marrying is up to them. If they want to exclude two brothers, they may have to come up with a rational basis for doing so. I can't think of one, but maybe someone else can.

Windsor holds that each state has "virtually exclusive" authority to define marriage as the state sees fit, so long as federal constitutional rights are not violated. 133 S. Ct. at 2691. The plaintiffs read that to mean that each state has the right to define marriage as the state sees fit so long as the definition is genderless. The plaintiffs' reading evokes Henry Ford's "You can have any color car you

want so long as it is black." The plaintiffs misread *Windsor*. *Windsor* holds that each state can decide for itself whether to allow and recognize same-sex marriage.

VII. Conclusion

The Sixth Circuit's decision should be affirmed. The answer to both questions presented is "no."

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